Supreme Court, U.S.
FILED
JUN 7 - 2004
OFFICE OF THE CLERK

No. 03-641

IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

RAYMOND L. SMITH, JR.
REGAL CINEMAS, INC
7132 Regal Lane
Knoxville, TN 37918

LAURA M. FRANZE
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioners

187849

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners, Regal Cinemas, Inc. and Eastgate Theatre, Inc., are both ultimately owned by Regal Entertainment Group, which is publicly traded.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices v

I. Introduction 1

II. Arguments 3

A. The Access Board's Anticipated Revisions Of ADAAG Will Neither Resolve Nor Minimize The Circuit Conflicts Presented In This Case. 3

B. The Circuit Conflicts Are Deep, Irreconcilable, And Intolerable. 6

C. The Ninth Circuit's Decision Is A Proper Vehicle For Reviewing The Conflicts Presented In This Case. 7

D. The Government's Various Merits Arguments Do Not Obscure Or Diminish The Pending Circuit Conflicts. 8

III. Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnhart v. Walton, 535 U.S. 212 (2002) 9

Caruso v. Blockbuster-Sony Music Entm't Ctr., 174 F.3d 166, *vacated and superceded by* 193 F.3d 730 (3d Cir. 1999) 1

Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000) 2, 9, 10

Meineker v. Hoyts Cinemas Corp., 69 Fed. Appx. 19 (2d Cir. 2003) 4

Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (D. Or. 2001), *rev'd, Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003) 1, 10

Stewmon v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003) ..... *passim*

United States v. AMC Entm't, Inc., 232 F. Supp. 2d 1092 (C.D. Cal. 2002) 5, 7

United States v. Cinemark USA, Inc., 348 F.3d 569 (6th Cir. 2003) 2, 4, 7, 8

United States v. Cinemark, No.1:99 CV-705 (N.D. Ohio March 26, 2004) 7

United States v. Hoyts Cinemas Corp., 256 F. Supp. 2d 73 (D. Mass. 2003) 1, 2

Cited Authorities

Page

Statutes:

42 U.S.C. § 12186(b) 4

42 U.S.C. § 12186(c) 4

42 U.S.C. § 12186(d) 4

42 U.S.C. § 12204(a) 4

Other:

Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 101 (April 2002) 4

Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <*http://www.access-board.gov/ada-aba/status.htm*> 5

SMPTE, *Engineering Committees*, <http://www.smpte.org/engineering_committees/> 9

TABLE OF APPENDICES

Page

Appendix A — Excerpts From Brief For The United States As *Amicus Curiae* Supporting Appellants And Urging Reversal Filed October 19, 2001 .. 1a

Appendix B — Excerpts From Brief For The United States As Appellant Filed June 5, 2002 ..... 3a

Appendix C — Excerpts From Brief For The United States As *Amicus Curiae* Supporting Appellants And Urging Reversal Filed December 16, 2002 .. 5a

Appendix D — Excerpts From Reply Memorandum Of Plaintiff United States In Support Of Motion For Partial Summary Judgment Re: Line Of Sight Issues Filed November 12, 2002 ..... 7a

Appendix E — Excerpts From Plaintiff United States' Opposition To Defendant's Motion For Partial Summary Judgment For All Stadium-Style Movie Theaters Within The Fifth Circuit Filed April 26, 2004 ..... 10a

I. INTRODUCTION

The Department of Justice is heavily invested in its six-year litigation campaign against the motion picture theater industry. This nationwide campaign has resulted in a clear and irreconcilable conflict in the circuits and copycat litigation exploding in still other circuits. The Solicitor General soothingly assures the Court that the conflict is "shallow" and will magically disappear with the combination of Access Board rulemaking, which "will then be followed" by DOJ rulemaking. U.S. Brief at 8. The Solicitor General is wrong on all counts. There is a clear conflict here and now, it is wreaking havoc here and now, and the "wait until tomorrow" solution promised by the Solicitor General is illusory, unrealistic, and incapable of washing out the vital issues in this closely-watched case.

The Government's dismissive attitude comes with ill grace in view of the dismay expressed by numerous federal judges over the Department of Justice's decision to govern through litigation and *amicus* briefs rather than through rulemaking.[1] Despite a congressional mandate to produce clear guidance in

1. *See, e.g., United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92-93 (D. Mass. 2003) (chastising the agency for being "lethargic in its rulemaking capacity" and "instead cho[osing] to bring lawsuits," and proclaiming "[a]s a matter of policy, the executive should be discouraged from attempting to get the courts do for it what it ought do for itself through the rulemaking process"); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.2 (D. Or. 2001) (acknowledging Regal's "moving target" criticism of the DOJ and opining that "the vague viewing angle standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking rather than through an interpretative rule"), *rev'd, Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003); *see also Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 174 F.3d 166, 177 ("Indeed, the DOJ probably could have achieved [its goal that wheelchair users be given lines of sight equivalent to standing patrons] already had it followed th[e] course [of notice and comment rulemaking] initially."), *vacated and superceded by* 193 F.3d 730, 737 (3d Cir. 1999) (to "adopt a new substantive regulation[,] [the DOJ] must proceed with notice-and-comment rulemaking").

its construction regulations, the Department has long rejected the notice and comment procedures suggested by courts in favor of a game of interpretive hide and seek that has thrown an entire industry into utter confusion. Notwithstanding the Government's efforts to marginalize the Fifth Circuit's decision in *Lara*, in truth, the district and circuit courts are all over the map in interpreting and deferring to the DOJ on this regulation and, if anything, it is the two-judge majority panel decision in *Stewmon* that stands on the fringe.[2]

This case is a particularly strong vehicle for resolving these conflicts. In enacting Title III of the ADA, Congress took great pains to ensure that designers, owners, and builders had clear and adequate notice of accessibility obligations. Under the circumstances of this statute, the Court should review whether a federal agency may impose substantive requirements via a purported, but not genuine, "interpretation" of its own regulation. The lower courts are hopelessly divided and, absent review by this Court, the reliability and finality of all accessibility regulations will remain in question. Moreover, as nothing limits the Ninth Circuit majority's holdings to the particular regulatory

2. Judge B. Fletcher's opinion for the divided panel in *Stewmon* sits at the outer edge of this mass of confusion. The unanimous panel of the Fifth Circuit (Judges Davis, Garwood, and Politz), the Northern District of Ohio (Judge Nugent), the District of Oregon (Judge King), the Northern District of New York (Judge Hurd), and the Ninth Circuit's Judge Kleinfeld each disagree, in reasoning and result, with the *Stewmon* majority opinion. Moreover, far from presenting the unified position against the Fifth Circuit that the Government suggests, the Sixth Circuit differs from the Ninth Circuit on the scope of deference to accord to the DOJ's interpretation of Standard 4.33.3. *Compare United States v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003), *with Stewmon*, 339 F.3d at 1133. Both the Sixth Circuit and the District of Massachusetts (Judge Young) depart dramatically from the Ninth Circuit on the fair notice argument as well. *See United States v. Cinemark*, 348 F.3d at 581-82 (suggesting that facts weigh heavily in favor of prospective relief only); *United States v. Hoyts*, 256 F. Supp. 2d at 91-93; *see also* Regal Petition for Certiorari at 25-29; Regal Reply Brief at 4-5; Hoyts *Amicus* Brief at 15 n.10.

context of Title III of the ADA, all other regulated industries now face comparable uncertainty.

II. ARGUMENTS

A. The Access Board's Anticipated Revisions Of ADAAG Will Neither Resolve Nor Minimize The Circuit Conflicts Presented In This Case.

Since at least 1998, the DOJ has pursued a policy of amending ADA Standard 4.33.3 via litigation and *amicus* brief. The Government has denied the industry's petition for rulemaking and ignored repeated admonishments from federal courts that a rulemaking solution would be preferable to litigation. *See* note 1, *supra*; *see also* NATO *Amicus* Brief at 2-3 & App. 1a-21a; Hoyts *Amicus* Brief at 8-9; Cinemark Petition for Certiorari, No. 03-1131, at 10 n.9. Now, however, the Government seeks to avoid this Court's review by asserting, of all things, the possibility of future rulemaking. There are several fundamental problems with the Government's position.

First, the Solicitor General's assertion that a definitive regulatory pronouncement is about to be promulgated is not correct. By arguing that supposedly upcoming design revisions emanating from the Access Board will somehow "resolve" the circuit conflict over Standard 4.33.3, the Government confuses the ADAAG with the actual regulations at issue in this case, the DOJ's "ADA Standards for Accessible Design," also called "JDSAD," or, more commonly, the "ADA Standards." The terms "ADAAG" and "ADA Standards" have often been used interchangeably by builders, inspectors, design professionals, *amici*, parties in this case, and even the various courts. This common practice caused no problem previously because the ADAAG and the ADA Standards are essentially identical, and ADAAG 4.33.3 and ADA Standard 4.33.3 are verbatim identical.[3] Since July 26, 1991, however, the ADAAG's

3. In 1991, the DOJ and the Access Board engaged in simultaneous (Cont'd)

application to privately-owned facilities regulated under Title III of the ADA is, as a matter of law, merely advisory. 42 U.S.C. § 12204(a); 42 U.S.C. § 12186(b), (c).[4] Congress delegated to the DOJ, not the Access Board, responsibility for rulemaking under Title III, and thus it is the DOJ's own ADA Standards that are legally enforceable on private facilities, not the Access Board's ADAAG. *See id.*; *accord* DOJ *Amicus* Brief for Appellants at 11, *Stewmon v. Regal Cinemas, Inc.*, Supp. App. 1a-2a ("[t]he Attorney General has the sole power to issue binding regulations to carry our [Title III's] 'new construction' provisions"); Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 101 (April 2002) (stating that "draft" guidelines "are to be applied . . . to the extent required *by regulations issued by Federal agencies* under the Americans with Disabilities Act") (emphasis added).[5] In sum, the Access

(Cont'd)
notice and comment rulemaking, and the DOJ adopted the ADAAG without modification as its own design standards in July of 1991. Not so in 1999-2004. The DOJ has not even commenced rulemaking on any potential amendment of ADA Standard 4.33.3.

4. While Congress charged the Access Board with the original responsibility to issue "minimum guidelines" for implementing Title III (42 U.S.C. § 12204(a)), and further provided that, in the event the Attorney General failed to timely promulgate regulations to implement Title III, compliance with the Access Board's guidelines would be sufficient to "satisfy the requirement[s]" of Title III (42 U.S.C. § 12186(d)), this contingent legal effect was obviated by the DOJ's issuance of its own design standards on July 26, 1991.

5. The DOJ has repeatedly emphasized this point in lawsuits against other movie theater exhibitors. *See, e.g.*, DOJ Opening Brief for Appellant at 25-26, *United States v. Cinemark USA, Inc.*, Supp. App. 3a-4a ("The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here . . . the Board's guidelines do not themselves have the force of law."); DOJ *Amicus Curiae* Brief for Appellants at 20-21, *Meineker v. Hoyts Cinemas Corp.*, Supp. App.
(Cont'd)

Board's ADAAG and the DOJ's ADA Standards are not the same thing, and the DOJ has not even *begun* the multi-year process of review and amendment for its own ADA Standards.[6]

Second, even assuming that a regulation was actually forthcoming, it would necessarily have prospective application only. This would be cold comfort to an industry facing ruinous retrofitting liabilities. As the Solicitor General implicitly admits, stadium-style theaters have been built by the thousands since 1995, most before the DOJ's *de facto* amendment of Standard 4.33.3. These theaters, many approved by state inspectors under parallel and even DOJ "certified" codes, are now unlawful, prompting Judge Kleinfeld's observation that:

> under [the Ninth Circuit majority's] decision, retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.

(Cont'd)

5a-6a ("The Department, not the Access Board, has the sole authority to issue binding regulations to implement [Title III's] statutory provisions."); DOJ Reply Brief in Support of Motion for Summary Judgment for Plaintiff at 5-6, *United States v. AMC Entm't, Inc.*, Supp. App. 7a-9a ("[t]he Department of Justice alone is congressionally-tasked with promulgating binding regulations under Title III of the ADA").

6. Even the Solicitor General's assessment that the *Access Board* is "close to completing" a "forthcoming promulgation" of ADAAG revisions may be overly optimistic. It took the Access Board ten years to approve its draft "final rule" for submission to the Office of Management and Budget. *See* Hoyts *Amicus* Brief at 8 & App. 1a-2a; Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <*http://www.access-board.gov/ada-aba/status.htm*>. Furthermore, additional notice and comment is likely once the ADAAG's "final guidelines" emerge from OMB.

Stewmon, 339 F.3d at 1134 (Kleinfeld, J., dissenting). Theater owners received no guidance when they needed it most. Hoyts *Amicus* Brief at 8-10; Cinemark *Amicus* Brief at 5-6. Promulgating a rule now, without addressing the retroactive application of the DOJ's "interpretation," solves nothing.

Allowing the Government to conjure up imminent regulations as a means of defeating review in this Court immunizes and encourages a deeply irresponsible strategic approach to administrative lawmaking. The DOJ rejected the theater industry's 1999 petition for rulemaking with respect to Standard 4.33.3. No doubt this refusal stemmed significantly from the fact that such rulemaking would undermine the Department's litigating position. But having thus refused rulemaking in order to protect its briefing position, the Government should not now be allowed to protect itself against further judicial review through the *deus ex machina* of new regulations dropped from the heavens.

B. The Circuit Conflicts Are Deep, Irreconcilable, And Intolerable.

Admitting, as it must, the existing circuit conflicts, the Government argues that federal accessibility laws are not "an area in which uniformity is especially vital." U.S. Brief at 9. The Government suggests that designers, owners, and builders could mitigate the impact of the circuit conflicts by treating the different appellate court interpretations of a single federal statute as akin to varying state and local building codes. U.S. Brief at 9-10. This argument of convenience is plainly inconsistent with congressional intent. *See, e.g.*, Cinemark *Amicus* Brief at 3-5; AMC *Amicus* Brief at 10-16; Cinemark Petition for Certiorari at 2-3, 20-22.[7] And the burden on the nation's builders is simply too high. *See, e.g., Stewmon*, 339

7. The Government's suggestion that builders simply emulate "the requirements . . . as enforced by the Sixth and Ninth Circuits" is also unworkable. As Judge Kleinfeld observed, the Ninth Circuit's holding is "no help at all to theater owners trying to comply with the law." *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

F.3d at 1134 (Kleinfeld, J., dissenting); NATO *Amicus* Brief at 13-15; AMC *Amicus* Brief at 13 n.8.

The Government itself has never demonstrated any willingness to respect the "piecemeal compliance" solution it proposes to this Court. In litigation against individual theater operators, the DOJ has consistently pursued liability findings that extend well beyond the geographic boundaries of the circuits where the lawsuits are filed.[8] And the Government's use of *amicus*, combined with its assertions of collateral estoppel immunity, permits the DOJ to litigate against a theater company unsuccessfully as partisan *amicus curiae* in one circuit, and later litigate against the same theater company as party-plaintiff in another circuit. *See United States v. Cinemark*, 348 F.3d at 583-84.

C. The Ninth Circuit's Decision Is A Proper Vehicle For Reviewing The Conflicts Presented In This Case.

The present case is a proper vehicle for review on the questions raised by Regal. The Ninth Circuit majority not only reversed the district court's final judgment in favor of Regal, it *issued express instructions to grant summary judgment in favor of Respondents*, which, as Judge Kleinfeld recognized, retroactively placed thousands of movie theaters out of compliance. *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

While the Government suggests that the fair notice issue will be taken up on remand, it points to nothing in the Ninth

8. To this day, the DOJ continues to maintain lawsuits concerning theaters located within the geographic boundaries of the Fifth Circuit, despite authoritative Fifth Circuit precedent that rejects the agency's litigating position. *See, e.g.*, Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 4-6, *United States v. Cinemark*, Supp. App. at 10a-13a. At least one court has accepted the DOJ's position on this point. *See AMC Entm't, Inc.*, 232 F. Supp. 2d at 1114-15. For additional discussions of multiple circuit litigation by the DOJ against single movie theater operators, see Cinemark *Amicus* Brief at 6-8 and Hoyts *Amicus* Brief at 1-2.

Circuit majority's opinion to support this proposition, creating out of the blue, instead, a claim that Regal "concedes" this point. U.S. Brief at 19. One would search Regal's Petition for Certiorari in vain, however, for the evidence of that proffered "concession." On the referenced page, Regal merely laments the majority's failure to even *address* the issue of fair notice. Judge Kleinfeld makes a similar observation. *Stewmon*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

Also in direct contrast to Judge Kleinfeld's views, the Government argues that the Ninth Circuit's retroactive ruling "need not" have "dire" consequences for the industry. *See* U.S. Brief at 19-20. Strangely, the Government's sole support for this proposition is a citation to a footnote in the Sixth Circuit's *United States v. Cinemark* opinion documenting the DOJ's last minute "assurances" to a judicial panel whose hackles were raised by the Government's unfair approach to notice. *See* U.S. Brief at 20. The Government does not bother to explain how that opinion or footnote provides any assurances to *Regal*, or to others doing business in the *Ninth Circuit*, against *private* plaintiffs such as Stewmon. Belated assurances aside, and given the Government's position on nonmutual collateral estoppel and its proven non-acquiescence on Standard 4.33.3, the Government's vague promise to be "reasonable" in the Sixth Circuit leaves much margin for mischief.

D. The Government's Various Merits Arguments Do Not Obscure Or Diminish The Pending Circuit Conflicts.

The Government attempts to obscure the certiorari issues with merits arguments that neither minimize the very real conflicts between three of the most populous and influential circuits in the country nor mitigate the "impossible uncertainty" described by Judge Kleinfeld.[9] Moreover, much of the

9. Nothing in the cases cited by the Solicitor General as recent pronouncements of the deference standard for agency interpretation of regulations suggests that this Court's review is unnecessary. Indeed, these decisions are largely nonresponsive to the question of what makes one (Cont'd)

Government's argument is based on citations to hand-selected and unrepresentative "industry reports" and other "evidence" that were not a part of the record before the district court, and to which Regal has had no real opportunity for rebuttal. And other than the SMPTE report, which the Government fails to mention is now rescinded (*see* SMPTE, *Engineering Committees*, available at <http://www.smpte.org/engineering_committees/>), none of these publications were relied upon in the *Lara amicus* brief.

Accepting the Government's premise also requires one to conclude that numerous neutral governmental inspectors, several federal courts, and the entire movie theater industry independently misconstrued the regulation in the same disastrously "wrong" way. The Government's position also ignores that the DOJ facilitated these "wrong" interpretations. *See, e.g.*, Hoyts *Amicus* Brief at 9-10; Cinemark *Amicus* Brief at 5, 10; AMC *Amicus* Brief at 2-3; *see also* Cinemark's Petition for Certiorari at 4-6 (state codes).

The mere fact that in six years of litigation against an entire industry, the Government has yet to identify a single stadium-style theater built prior to 1998 that it believes was correctly designed, is telling. Even more compelling, however, is the fact

---

(Cont'd)
"interpretation" entitled to controlling deference when another is not. The Court's statement in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), that "whether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue" does not settle this issue or provide guidance sufficient to explain the different results in the cases cited by Regal in its Petition for Certiorari. Moreover, none of the cases relied upon by the Solicitor General involve an agency interpretation of a regulation that is only articulated in litigation briefs, by agency trial attorneys, stated differently virtually every time the agency has call to articulate it, and announced months or even years after the allegedly discriminatory theaters were designed and constructed. *See* NATO *Amicus* Brief at 3-4, 13; Hoyts *Amicus* Brief at 2-3, 7-16; Cinemark Petition for Certiorari at 6-9, 22-23.

that neutral state officials, applying DOJ-certified codes, gave pre- and post-construction approval to theaters that the DOJ now says were incorrectly designed. *See generally* Cinemark *Amicus* Brief at 2-5; Cinemark Petition for Certiorari at 6. And the Government fails to point to a single instance, prior to July 1998, in which it provided technical assistance to a movie theater operator by revealing its current position on the meaning of "lines of sight comparable." Nor is the Government able to point to any pre-*Lara* enforcement action or settlement agreement in which it articulated the "viewing angles" requirements that it now asserts, despite the fact that literally thousands of stadium-style movie theaters were constructed between 1995 and 1998. Hoyts *Amicus* Brief at 11; Cinemark *Amicus* Brief at 3; AMC *Amicus* Brief at 3. Perhaps hoping to capitalize on the inherent difficulty of "proving a negative," the Government nonetheless boldly asserts that it has "consistently" interpreted the "lines of sight comparable" language of Standard 4.33.3. The truth is otherwise, as every movie theater chain can attest. *See* NATO *Amicus* Brief at 3, 4, and n.6, 13; Hoyts *Amicus* Brief at 2-3, 7-16; Cinemark Petition for Certiorari at 6-9, 22-23 and n.16; *see also OPVA*, 142 F. Supp. 2d at 1297 n.2.

III. CONCLUSION

Despite its deliberate decision to forego notice and comment rulemaking in favor of litigation, when it is now presented with an opportunity for this Court to review the circuit conflicts that its multi-year litigation efforts have wrought, the Government reverses position and makes the hollow promise that the conflicts will be resolved by future rulemaking. The Ninth Circuit's decision has rewarded regulatory amendment by *amicus* brief and conscious manipulation of judicial deference doctrines. The DOJ's rulemaking by *amicus* is unfettered by public participation, virtually unaccountable to the courts, and disregards Congress's mandate. The DOJ has created intolerable circuit conflict. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Raymond L. Smith, Jr.
Regal Cinemas, Inc
7132 Regal Lane
Knoxville, TN 37918

Laura M. Franze
Counsel of Record
Akin Gump Strauss
Hauer & Feld LLP
1700 Pacific Avenue
Suite 4100
Dallas, TX 75201
(214) 969-2800

Counsel for Petitioners